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90-760

No. .....

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK CARDEN McNUTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1990

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QUESTIONS PRESENTED

Petitioner was convicted of conspiracy to manufacture, possess, assemble or sell a surreptitious interception device, a violation of 18 U.S.C. Section 2512 (1)(b). Petitioner's indictment and conviction arose out of his operating a business wherein he sold modified satellite television descramblers. The questions presented for appeal are as follows:

1. Does the Communications Act of 1934, 47 U.S.C. Section 601 et seq. provide the exclusive remedy for the unauthorized decryption of satellite cable programming?

2. Does a satellite television descrambler "intercept" a satellite television signal as "intercept" is defined in 18 U.S.C. Section 2510 (4) or does the satellite television descrambler merely decode the signal received by the satellite dish?

LIST OF PARTIES

The Petitioner was indicted in the United States District Court for the Northern District of Oklahoma. Named as Co-Defendants in the Indictment were Hank Dwayne Wilson and James J. Baker. Wilson and Baker entered guilty pleas to lesser charges before trial.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

BASIS FOR FEDERAL JURISDICTION OF DISTRICT COURT 5

REASONS FOR GRANTING THE WRIT 5

In a case of first impression, the United States Court of Appeals for the Tenth Circuit extended the reach of Title 18 U.S.C. Section 2512 (1)(b) far beyond the contemplation of the Congress when it originally enacted the Omnibus Crime Control and Safe Streets Act of 1968. The Statute in question was originally intended to establish a relatively narrow category of devices whose principal use was likely to be for wiretapping or eavesdropping. Nowhere in the Statute or legislative history, past or present, is there an indication by Congress that the unauthorized decryption of satellite cable television programming is a violation of Section 2512 (1)(b). On the other hand, the Communications Act of 1934, 47 U.S.C. Section 601, et seq. (Section 605 in particular), expressly prohibits the sale of any device by any person who knows or has reason to know that the device is primarily of assistance in the authorized decryption of satellite cable programming.

Therefore, the Writ should be granted because the United

TABLE OF CONTENTS CONTINUED PAGE(S)

States Court of Appeals for the Tenth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court. The question is whether the Communications Act of 1934, 47 U.S.C. Section 601 et seq. provides the exclusive remedy for the unauthorized decryption of satellite cable programming.

18 U.S.C Section 2512 (1)(b) makes it a felony offense to possess a device which can surreptitiously intercept communications. If a modified satellite television descrambler is held to be such a device, then the thousands of people who own such a device and use it for the private viewing of satellite television in their own homes are violating the law.

On the other hand, 47 U.S.C. Section 605 (4) does not make it an offense to possess such a device. That Statute requires something more (i.e. manufacture, sell, modify, etc.).

This court should grant the Writ in this case to settle this most important question which could have a very far reaching impact on the lives of thousands of innocent purchasers of these devices.

CONCLUSION 10

APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit

APPENDIX B

Order denying Petition for Rehearing

TABLE OF AUTHORITIES

Cases

PAGE(S)

United States v. McNutt, 908 F.2d 561 (10th Cir. 1990) . . 1

Statutes

18 U.S.C Section 341 5

18 U.S.C. Section 1029 . . . . . 3, 5

18 U.S.C. Section 2510 . . . . . 2, 9, 10

18 U.S.C. Section 2512 (1)(b) 2, 3, 4, 5, 6, 7, 8, 9, 10

18 U.S.C. Section 2512 (4) 2

28 U.S.C. Section 1254 (1) 2

47 U.S.C. Section 601 . . . . . 5, 6

47 U.S.C. Section 605 (4) 3, 6, 7, 8, 9, 10

Other

1968 U.S. Code Cong. & Ad. News 2153 7

1986 U.S. Code Cong. & Ad. News 3555 8

1986 U.S. Code Cong. & Ad. News 3559 8

1986 U.S. Code Cong. & Ad. News 3562 8

1986 U.S. Code Cong. & Ad. News 3563 8

1986 U.S. Code Cong. & Ad. News 3576 9

No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MARK CARDEN McNUTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The citation for the opinion of the United States Court of Appeals for the Tenth Circuit is *United States v. McNutt*, 908 F.2d 561 (10th Cir. 1990).

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on July 3, 1990. A Petition for Rehearing was filed and an Order denying the Petition for Rehearing was entered on August 17, 1990. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 18, United States Code, Section 2512 (1) (b) provides that:

> Except as otherwise specifically provided in this chapter, any person who intentionally -
>
> > (b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce shall be fined not more than $10,000.00 or imprisoned not more than 5 years or both.

Title 18 United States Code, Section 2510 provides in pertinent part that.

As used in this chapter -

> (4) Intercept means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

Title 18 United States Code, Section 2510 provides in pertinent part:

> (12) Electronic communication means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, photooptical that affects interstate or foreign commerce...

Title 47 United States Code, Section 605 (4) provides that:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000.00 for each violation or imprisoned for not more than five years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

STATEMENT OF THE CASE

Petitioner was indicted on March 9, 1989, and charged with conspiracy to traffic in counterfeit access devices, namely, codes, plates and account numbers to gain access to encoded commercial satellite television signals affecting interstate commerce in violation of 18 U.S.C. Section 1029. Petitioner was also charged with conspiracy to manufacture and sell electronic devices which were primarily useful for the surreptitious interception of electronic communications in volation of Title 18 U.S.C. Section 2512 (1)(b).

According to the Indictment, the Petitioner obtained satellite television descramblers and satellite television descrambler modules, caused them to be illegally modified and then sold them. A satellite television descrambler is an instrument used to decode satellite television signals which have been scrambled by satellite

cable programming companies in order to prevent persons from obtaining access to the signals without paying a subscription fee. Petitioner would modify the satellite television descramblers and modules to allow persons to obtain the satellite cable programming signals without having to pay said subscription fees.

National programmers of pay television transmit their programming to communications satellites. These satellites then relay the television signal to large receiver dishes usually operated by a local cable television operator. Cable companies pay a royalty to the national programmer and provide television service via wire to home television viewers in exchange for a monthly service charge. In the 1980's, homeowners were able to purchase satellite dishes capable of receiving signals directly from these communication satellites, by-passing local cable companies altogether, thus allowing the owner of a satellite dish to obtain the benefits of national pay television programming without paying for the service. As a countermeasure, the programmers began scrambling their broadcasts, rendering such broadcasts unintelligible to unauthorized viewers. In order to descramble the broadcast signal, the owners of satellite television dishes had to purchase a descrambler module. The module contained its own unique electronic address which allowed the programming service to identify the person using the descrambler module for purposes of account and billing information. That information is then programmed into the satellite transmissions which in turn trigger the descrambler module to descramble the television signal.

Petitioner challenged the sufficiency of the Indictment in the District Court, arguing that 18 U.S.C. Section 2512 (1)(b) established a relatively narrow category of devices whose primary use was likely to be for eavesdropping and wiretapping, and that the production and sale of the modified satellite television descram-

bler device was not within the purview of the Statute. He also argued that the Communications Act of 1934, 47 U.S.C. Section 601 et sq. provided the exclusive remedy for the unauthorized decryption of satellite cable programming.

On appeal, the Tenth Circuit Court of Appeals held that 18 U.S.C. Section 1029 could not be applied to satellite television descramblers, but that Section 2512 (1) (b) could be. Because the jury placed independent reliance on Section 1029 and Section 2512 (1) (b) as substantive offenses underlying the conspiracy, the conspiracy conviction was affirmed. The case was remanded to the District Court for resentencing. The District Court imposed the same sentence upon McNutt as it had done in the beginning, to wit, five years probation.

BASIS FOR FEDERAL JURISDICTION OF DISTRICT COURT

Jurisdiction was invoked in the District Court pursuant to Title 18 U.S.C. Section 1029, Title 18 U.S.C. Section 341 and Title 18 U.S.C. Section 2512 (1)(b).

REASONS FOR GRANTING THE WRIT

IN A CASE OF FIRST IMPRESSION, THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT EXTENTED THE REACH OF TITLE 18 U.S.C. SECTION 2512 (1)(b) FAR BEYOND THE CONTEMPLATION OF THE CONGRESS WHEN IT ORIGINALLY ENACTED THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968. THE STATUTE IN QUESTION WAS ORIGINALLY INTENDED TO ESTABLISH A RELATIVELY NARROW CATEGORY OF DEVICES WHOSE PRINCIPAL USE WAS LIKELY TO BE FOR WIRETAPPING OR EAVESDROPPING. NOWHERE IN

THE STATUTE OR LEGISLATIVE HISTORY, PAST OR PRESENT, IS THERE AN INDICATION BY CONGRESS THAT THE UNAUTHORIZED DECRYPTION OF SATELLITE CABLE TELEVISION PROGRAMMING IS A VIOLATION OF SECTION 2512 (1) (b). ON THE OTHER HAND, THE COMMUNICATIONS ACT OF 1934, 47 U.S.C. SECTION 601, ET SEQ. (SECTION 605 IN PARTICULAR), EXPRESSLY PROHIBITS THE SALE OF ANY DEVICE BY ANY PERSON WHO KNOWS OR HAS REASON TO KNOW THAT THE DEVICE IS PRIMARILY OF ASSISTANCE IN THE AUTHORIZED DECRYPTION OF SATELLITE CABLE PROGRAMMING.

THEREFORE, THE WRIT SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. THE QUESTION IS WHETHER THE COMMUNICATIONS ACT OF 1934, 47 U.S.C. SECTION 601 ET SEQ. PROVIDES THE EXCLUSIVE REMEDY FOR THE UNAUTHORIZED DECRYPTION OF SATELLITE CABLE PROGRAMMING.

18 U.S.C. SECTION 2512 (1)(b) MAKES IT A FELONY OFFENSE TO POSSESS A DEVICE WHICH CAN SURREPTITIOUSLY INTERCEPT COMMUNICATIONS. IF A MODIFIED SATELLITE TELEVISION DESCRAMBLER IS HELD TO BE SUCH A DEVICE, THEN THE THOUSANDS OF PEOPLE WHO OWN SUCH A DEVICE AND USE IT FOR THE PRIVATE VIEWING OF SATELLITE TELEVISION IN THEIR OWN HOMES ARE VIOLATING THE LAW.

ON THE OTHER HAND, 47 U.S.C. SECTION 605 (4) DOES NOT MAKE IT AN OFFENSE TO POSSESS SUCH A DEVICE. THAT STATUTE REQUIRES SOMETHING MORE (ie. MANUFACTURE, SELL, MODIFY, ETC.).

THIS COURT SHOULD GRANT THE WRIT IN THIS CASE TO SETTLE THIS MOST IMPORTANT QUESTION WHICH COULD HAVE A VERY FAR REACHING IMPACT ON THE LIVES OF THOUSANDS OF INNOCENT PURCHASERS OF THESE DEVICES.

The application of Title 18 U.S.C. Section 2512 (1)(b) to the unauthorized decryption of satellite cable programming is a matter which has not previously been addressed by any Federal Appellate Court. A review of the statutory language and legislative history clearly reveals that the unauthorized decryption of satellite cable programming should come under the exclusive purview of the Communications Act of 1934, and in particular Title 47 U.S.C. Section 605.

Section 2512 was originally adopted in 1968 as part of Title III, A Public Law 90-351, The Omnibus Crime Control and Safe Streets Act. The purpose of the Statute was to protect the privacy of wire and oral communications and to delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communications could be authorized. The statutory language was intended to establish a relatively narrow category of devices whose principal use was likely to be for wiretapping for eavesdropping. 1968 U.S. Code Cong. & Ad. News 2153.

Furthermore, when this Act was passed in 1968, satellite television did not exist. There was no satellite cable programming to intercept. There were no scrambled satellite television signals to descramble. Certainly then, the Statute as originally enacted did not specifically cover the unauthorized decryption of satellite cable programming.

In 1986, Congress passed the Electronic Communications Privacy Act of 1986, a portion of which amended Title III of

the Omnibus Crime Control and Safe Street Act of 1968. The Bill was designed to update and clarify federal privacy protection and standards in light of dramatic changes in new computer and telecommunication technologies. 1986 U.S. Code Cong. & Ad. News 3555. The statement of purpose of the Electronic Communications Privacy Act reveals the intent of Congress to provide the same level of protection to new forms of private business and personal communications that under the 1968 Act had been afforded only to voice communications over the telephone. 1986 U.S. Code Cong. & Ad. News 3559.

The Senate report to the Electronic Communications Privacy Act of 1986 identifies six new forms of electronic communications that Congress intended to include within the protection afforded by Section 2512. The electronic communications included electronic mail, computer-to-computer communications, electronic bulletin boards, microwave, video surveillance and electronic papers. 1986 U.S. Code Cong. & Ad. News 3562, 3563. Nowhere in the legislative history does Congress suggest that the unauthorized decryption of cable satellite television programming is to be included in the definition of electronic communications in Section 2512.

One reason the 1986 Amendment to Section 2512 did not include the unauthorized decryption of satellite cable television programming within the prohibited conduct involving electronic communications is because there was already a Statute in effect which prohibited the unauthorized interception of satellite cable television programming, namely 47 U.S.C. Section 605. This Statute expressly prohibits the unauthorized decryption of cable satellite television programming. That is precisely the conduct Petitioner was engaged in which the Respondent claims violates 2512 (1)(b). However, the Senate report to the 1986 Amendment

to Section 2512 expressly provides that the Communications Act of 1934, 47 U.S.C. Section 601 et seq., provides the exclusive remedy for interception of satellite television programming:

> The private viewing of satellite cable programming, network feeds and certain audio subcarriers will continue to be governed exclusively by Section 705 of the Communications Act of 1934, as Amended, and not by Chapter 119 of Title 18 of the United States Code. 1986 U.S.C. Cong. & Ad. News 3576.

Incredibly, the Tenth Circuit Court of Appeals failed to address this crucial part of the legislative history in its opinion.

As noted earlier, Section 2512 (1)(b) makes it a felony offense to simply possess a device designed to surreptitiously intercept communications. If this Court holds that a modified satellite television descrambler is such a device, then thousands if not millions of persons who own such a device and use it only for the private viewing of television in their homes will be subject to felony prosecution, fine and imprisonment by the Federal Government.

If, however, the Court finds that this subject matter comes under the exclusive purview of 47 U.S.C. Section 605, then only those persons who manufacture, assemble, sell, etc. these devices are subject to prosecution.

Certainly that is the result Congress intended when it passed and later amended Section 605. Equally as certain is the fact that Congress did not intend for the owners of modified descramblers to be subject to felony prosecution. If that were the case, Congress could have been more specific and definitive in its choice of words when it amended Section 2512 (1)(b) and Section 2510.

The Tenth Circuit Court of Appeals also erred in its finding that satellite television descramblers are electronic devices which

effectuate the interception of electronic communications. A satellite television descrambler cannot receive or intercept anything. It is the satellite dish which receives the cable satellite signal. The descrambler merely decodes the scrambled signal which is received by the satelite dish so that the owner of the satellite dish and descrambler can get a clear television picture. Therefore, a satellite television descrambler cannot be a device which is primarily useful for the purpose of the surreptitious interception of electronic communications because it is a device which is totally incapable of receiving or intercepting any communications.

CONCLUSION

The Tenth Circuit Court of Appeals has extended the scope of 18 U.S.C. Section 2512 (1)(b) far beyond the intent of Congress. Section 2512 (1)(b) was never intended to prohibit the unauthorized decryption of cable satellite television programming. According to the legislative history and the Federal Statutes, that conduct is governed exclusively by the Communications Act of 1934 and in particular 47 U.S.C. Section 605.

A satellite television descrambler, by its very nature, cannot intercept a communication, as the term intercept is defined in 18 U.S.C. Section 2510 (4). A satellite television descrambler, modified or not, cannot meet the statutory definition of a device which is primarily designed to surreptitiously intercept communications because a descrambler does not intercept, it deciphers or decodes.

Accordingly, the Petitioner requests this Court to grant the Petition for Writ of Certiorari and to reverse the decision of the United States Court of Appeals for the Tenth Circuit with instruc-

tions to remand the case to the Trial Court for dismissal of the Indictment.

Respectfully submitted,

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November, 1990

APPENDICES

APPENDIX A

[Filed July 3, 1990]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee and Cross-Appellant, vs. MARK CARDEN McNUTT, Defendant-Appellant and Cross-Appellee.	)	Nos. 89-5153 89-5167

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 89-CR-16-1-C)

Kenneth P. Snoke, Assistant United States Attorney (Tony M. Graham, United States Attorney, with him on the brief), Tulsa, Oklahoma, for Plaintiff-Appellee and Cross-Appellant.

Anthony M. Laizure of Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, Tulsa, Oklahoma, for Defendant-Appellant and Cross-Appellee.

Before LOGAN and BALDOCK, Circuit Judges,
and DUMBAULD, District Judge.*

*The Honorable Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

BALDOCK, Circuit Judge.

Defendant-appellant Mark Carden McNutt was convicted by a jury of conspiracy to 1) traffic in a counterfeit access device, 18 U.S.C. § 1029, and 2) manufacture, possess, assemble or sell a surreptitious interception device, 18 U.S.C. § 2512(1)(b). On appeal, McNutt argues that neither § 1029 nor § 2512 apply to the cloned satellite television descramblers which led to his indictment. We hold that § 1029 cannot be applied to satellite television descramblers, but § 2512 can be. Because the jury placed independent reliance upon § 1029 and § 2512 as substantive offenses underlying the conspiracy, we affirm his conspiracy conviction. However, since the district court may have relied upon § 1029 in calculating McNutt's sentence, we remand for resentencing.

I.

National programmers of pay television transmit their programming to communications satellites. These satellites then relay the television signals to large receiver dishes, usually operated by a local cable television operator. Cable companies pay a royalty to the national programmer and provide television service via wire to home television viewers in exchange for a monthly service charge.

The 1980s saw a profusion of home satellite dishes capable of receiving signals directly from these communications satellites, bypassing local cable companies altogether. Owners of home

satellite dishes could obtain the benefits of national pay television programming without paying for the service. As the use of home satellite dishes proliferated, programmers sought to protect their investment by scrambling their broadcasts, rendering such broadcasts unintelligible to unauthorized viewers. DiGeronimo, *Protecting Wireless Communications: A Detailed Look at Section 605 of the Communications Act,* 38 Fed. Comm. L. J. 411, 430-31 n.101 (1987). In order to descramble broadcast signals, owners of satellite television dishes must purchase a descrambler module, each with its own unique electronic "address." *Television Engineering Handbook* 9.34 (K. Benson ed. 1986). Home viewers then contact the programming service, identify the electronic address on their descramber module and provide necessary billing information. Once an account is opened, the national pay television service programs the subscriber's electronic address into its satellite transmissions. These transmissions then trigger the particular descrambler module to descramble the television signal.

McNutt was convicted of conspiracy to possess, manufacture, assemble or sell descrambler modules with "cloned" electronic addresses taken from descramblers with legitimate programming accounts. (Two legitimately sold descrambler modules never have the same address.) By using a cloned descrambler, the electronic message from a national pay television service intended to trigger a single descrambler actually triggered several, even though pay television service had only been arranged for one electronic address. So long as that single legitimate account was maintained, owners of cloned descramblers could view scrambled programming without paying any subscription fees.

The first basis of the jury's conspiracy finding was 18 U.S.C. § 1029 which prohibits the trafficking, possession, use and manu-

facture of "counterfeit access devices."[1] Under § 1029,

> the term 'access device' means any card, plate, *code,* account number, or other *means of account access* that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value....

18 U.S.C. § 1029(e)(1) (emphasis supplied). The government contends that cloned electronic addresses on satellite television descrambler modules are an unauthorized "means of account access" under § 1029. Because the plain wording of the statute does not reveal whether the address on a satellite television descrambler is cognizable under § 1029, we consult the legislative history behind § 1029 as a "secondary source" to help us determine the scope of the statute. *See Miller v. Commissioner,* 836 F.2d 1274, 1282-83 (10th Cir. 1988) (reliance on legislative history is appropriate where statute is unclear and legislative history is consulted with specific question in mind).

In enacting § 1029, "Congress was focused upon the fraud-

---

[1]The statutes provides in pertinent part:

§ 1029 Fraud and related activity in connection with access devices

(a) Whoever -

(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

(2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;

(3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices; or

(4) knowlingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;

shall, if the offense affects interstate or foreign commerce, be punished as provided in . . . this section.

ulent use of [access] devices in connection with credit transactions . . . ." *United States v. Blackmon*, 839 F.2d 900, 913-14 (2d Cir. 1988) Congress sought to address "the growing problem in counterfeit credit cards and unauthorized use of account numbers or access codes to banking system accounts . . . ." H.R. Rep. 894, 98th Cong., 2d Sess., *reprinted in* 1984 *U.S. Code Cong. & Admin. News* 3182, 3689. Congress sought to include in its definition of access devices "credit cards, debit cards, account numbers and combinations of these and other methods of obtaining goods and services." *Id.* at 3705. Section 1029 has been applied to the unauthorized use of credit cards, *see United States v. Ryan,* 894 F.2d 355, 357 (10th Cir. 1990), and long distance telephone access codes, *see United States v. Teehee,* 893 F.2d 271, 272 (10th Cir. 1990). However, the government does not cite, nor have we been able to locate, a single case in which § 1029 has been applied to electronic addresses of satellite television descramblers.

The government contends that the electronic addresses in descramblers are a "means of account access" under § 1029(e)(1) because legitimate viewers who pay subscription fees to satellite television programmers provide a "free ride" to the users of cloned descramblers. In advancing this argument, however, the government has mistaken economic losses for actual monetary losses resulting from discrete transactions reflected in the company's accounting records. *See* R. Posner, *Economic Analysis of Law* § 1.1 at 6-7. As used in § 1029 an account constitutes "a formal record of debits and credits." *See Random House Dictionary of the English Language* 13 (2d ed. 1987). Unlike the unauthorized use of credit cards or long distance telephone access codes, use of cloned descrambler modules does not result in debits to legitimate subscribers' accounts; no additional charges are

accrued as a result of the unauthorized use. Unquestionably, operators of satellite television services suffer *economic* losses from the revenue forgone due to the use of cloned descrambler modules; viewers who otherwise would subscribe to a legitimate pay television service elect to obtain the same service through a cloned descrambler. Moreover, "free riding" by users of cloned descramblers increases the overall cost of satellite television services to legitimate viewers. Although Congress unquestionably has the power to protect broadcasters and viewers of satellite television from these economic harms,[2] we find nothing in the plain wording, legislative history or judicial interpretation of § 1029 which would lead us to believe that Congress intended that statute to apply to anything other than direct accounting losses. *See, e.g., Blackmon,* 839 F.2d at 913-14 (conviction under § 1029(a)(3) for use of unauthorized credit cards for false identification purposes was improper).

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[2]Congress provided such protection in 47 U.S.C. § 605(4) which provides in pertinent part:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming . . . shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both . . . .

McNutt therefore could be subject to civil and criminal penalties under § 605. *See ON/TV of Chicago v. Julien,* 763 F.2d 839, 842-43 (7th Cir. 1985) (sale of "decoder kits" for subscription television violates § 605); *National Subscription Television v. S & H TV,* 644 F.2d 820, 825 (9th Cir. 1981) (same); *Chartwell Communications v. Westbrook,* 637 F.2d 459, 466 (6th Cir. 1980) (same); *Subscription Television of Washington v. Kaufmann,* 606 F. Supp. 1540, 1544-55 (D.D.C. 1985) (Same); *United States v. Westbrook,* 502 F. Supp. 588, 592 (E.D. Mich. 1981) (unauthorized sale of television descramblers constitutes criminal violation of § 605).

III.

The second prong of McNutt's conspiracy conviction was 18 U.S.C. § 2512. Section 2512 imposes criminal sanctions against one who intentionally:

> manufactures, assembles, possesses or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or *electronic communications*....

18 U.S.C. § 2512 (emphasis supplied). Under § 2512, " 'intercept[ion]' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Under the statute,

> 'electronic communication' means *any* transfer of signs, signals, writing, *images, sounds,* data or intelligence of any nature transmitted in whole or in part by a wire, *radio,* electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce....

18 U.S.C. § 2510(12) (emphasis supplied).

McNutt argues that the legislative history behind § 2512 clearly establishes that satellite television broadcasts are not encompassed under the statute as electronic communications. However, we find the legislative history ambiguous on this question. Admittedly, the Senate Report indicates at one point that electronic communications "cannot fairly be characterized as containing the human voice." S. Rep. No. 99-541, 99th Cong. 2d Sess., *reprinted in* 1986 *U.S. Code Cong & Admin. News* 3555, 3568. However, two sentences later, the report lists electronic communications as including video teleconferences which clearly contain the human voice. *Id.* The report also contains repeated references to satellite

television broadcasts and the problems associated with their unauthorized interception. *See id.* at 3560, 3561, 3573. In contrast to this ambiguity, the plain wording of § 2510(12) encompasses satellite television signals. It is undisputed that satellite television transmissions contain sounds and images and are carried via radio waves; therefore they constitute electronic communications under § 2510(12). Satellite television descramblers also are electronic devices which effectuate the interception of electronic communications. Because the providers of pay television programming are unaware that their signals are being intercepted by cloned descramblers, such interception is surreptitious. Although some legislative history to the contrary exists, the clarity of the statutory language contrasted with the ambiguity in the legislative history obliges us to follow the plain wording of the statute. *See Miller,* 836 F.2d at 1282-83. We are "hesitant to give the words of the statute an altogether different meaning . . . because the direct legislative history is scant and capable of differing interpretations," *id.* at 1282, and consequently hold that McNutt property was charged under § 2512.

IV.

"[A] person is guilty of conspiracy if he agrees with one or more other persons to violate the law, and then any one of the conspirators commits an overt act in futherance of the object of the agreement." *United States v. Gonzalez,* 797 F.2d 915, 916 (10th Cir. 1986). However, where the underlying offense agreed upon by the putative conspirators does not constitute a substantive violation of federal law no consipiracy can be effectuated under 18 U.S.C. § 371. *Lubin v. United States,* 313 F.2d 419, 422 (9th Cir. 1963). Here, the jury indicated by special verdict that it relied *both* on § 1029 and § 2512 in finding McNutt guilty

of conspiracy. Because an intent to violate § 2512 standing alone can support a finding of conspiracy, we can say with assurance that the jury's improper reliance upon 18 U.S.C. § 1029 did not have a substantial influence upon its finding that McNutt was guilty of conspiracy to violate § 2512. *See* Fed. R. Crim. P. 52(b); *United States v. Rivera,* 900 F.2d 1462, 1469-70 (10th Cir. 1990) (en banc). McNutt's conviction under 18 U.S.C. § 371 therefore must stand.

V.

In calculating the appropriate sentence for a conspiracy conviction, the base offense level is that of the substantive offense which formed the object of the conspiracy. *See* United States Sentencing Commission, *Guidelines Manual,* § 2X1.1(a) (Nov. 1989). Here, McNutt's presentence report reveals that the probation office relied upon 18 U.S.C. § 1029 as the object offense and tabulated his offense level based upon § 2F1.1 of the Guidelines. Because we hold that McNutt did not violate § 1029, utilization of that statute in calculating McNutt's sentence was improper. Even though the district court departed downward from the recommended sentence, we cannot say that the court was not influenced by the offense level calculated by the presentence report. McNutt therefore must be sentenced under Guidelines § 2H3.2 with 18 U.S.C. § 2512 as the object offense.

McNutt's conviction is AFFIRMED and REMANDED for resentencing consistent with this opinion.[3]

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[3]Because we remand for resentencing, we need not address the government's cross-appeal challenging McNutt's sentence.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee/	)	
Cross-Appellant,	)	
	)	
vs.	)	Nos. 89-5153, 89-5167
	)	
MARK CARDEN McNUTT,	)	
	)	
Defendant-Appellant/	)	
Cross-Appellee.	)	

ORDER
Filed August 17, 1990

Before HOLLOWAY, Chief Circuit Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and DUMBAULD,* District Judges.

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*The Honorable Edward Dumbauld, District Judge, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

This matter comes on for consideration of appellant/cross-appellee's suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

(2)

No. 90-760

Supreme Court, U.S.
FILED
JAN 18 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK CARDEN MCNUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was subject to prosecution for conspiring to violate 18 U.S.C. 2512(1)(b), which prohibits the manufacture, assembly, possession, or sale of any device primarily useful for the surreptitious interception of electronic communications, by virtue of his participation in a scheme to distribute, to persons who had not paid subscriber fees for pay television channels, devices capable of descrambling the satellite transmissions for those channels.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)	9
Rubin v. *United States*, 449 U.S. 424 (1981)	9
United States v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026 (1989)	9

Statute and regulations:

Communications Act of 1934:	
§ 705, 47 U.S.C. 605	8
§ 705(a), 47 U.S.C. 605(a)	8
§ 705(b), 47 U.S.C. 605(b)	8
18 U.S.C. 1029	2, 3, 4
18 U.S.C. 2510(4)	6
18 U.S.C. 2510(12)	4, 5
18 U.S.C. 2511	6, 7, 8, 9
18 U.S.C. 2511(4)(b)	6
18 U.S.C. 2511(4)(c)	6, 7
18 U.S.C. 2511(4)(c)(i)	8
18 U.S.C. 2511(5)	6
18 U.S.C. 2512	2, 7
18 U.S.C. 2512(1)(b)	2, 3, 4, 5, 6
18 U.S.C. 2520(c)	6

Miscellaneous:

S. Rep. No. 541, 99th Cong., 2d Sess. (1986)	6, 7, 8

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 908 F.2d 561.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1990. A petition for rehearing was denied on August 17, 1990. The petition for a writ of certiorari was filed on November 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of conspiring to vio-

late 18 U.S.C. 1029 and 18 U.S.C. 2512. On appeal, the court of appeals upheld petitioner's conviction but remanded for resentencing. Pet. App. 1a-9a. On remand, petitioner was sentenced to 3½ years' probation and was ordered to pay a $5000 fine and $5000 in restitution.

1. Providers of pay television transmit their programming to communications satellites, which in turn relay it to satellite dishes on the ground. In the 1980s, many individuals purchased satellite dishes capable of receiving satellite television signals, thereby obtaining pay television without paying for the service. In response, providers of pay television began to scramble their broadcasts, making them unintelligible to unauthorized viewers. Persons authorized to receive the signals use descrambler modules to obtain intelligible programming. Each descrambler module has its own "address." In return for fees from a subscriber, a pay television provider adds a signal to its satellite transmissions that activates the module with that subscriber's address, causing the module to descramble the transmissions. Pet. App. 2a-3a.

Count 1 of the indictment alleged that petitioner and others conspired to violate 18 U.S.C. 1029 and 18 U.S.C. 2512(1)(b) by modifying descrambler modules to enable unauthorized viewers to descramble satellite television transmissions. The government's evidence showed that petitioner and co-conspirator James J. Baker owned a satellite equipment store out of which they sold and serviced equipment. Co-conspirator Hank Dwayne Wilson, an employee in the store, modified the descrambler modules so that they were capable of descrambling pay television channels.[1]

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[1] The co-conspirators obtained chips containing addresses authorized to receive all of the more than 50 pay television

Both new descramblers and equipment brought by customers to petitioner's store for servicing were modified; as a result, hundreds of customers were able to view scrambled television programming without paying for it.[2]

2. Before trial, petitioner moved to dismiss the conspiracy count on the ground that neither Section 1029 nor Section 2512(1)(b) applied to descrambler modules. The district court denied the motion. In a special verdict form, the jury found that petitioner was guilty of a conspiracy to violate both statutes.

On appeal, the court of appeals sustained petitioner's contention that Section 1029 was inapplicable to his conduct. The court held, however, that petitioner was subject to prosecution for conspiring to violate Section 2512(1)(b). That statute penalizes

> any person who intentionally * * * manufactures, assembles, possesses or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device

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channels. They then programmed other chips so that they contained those addresses. When placed in descrambler modules, the programmed chips would respond as though they had addresses authorized to receive the pay television channels; signals programmed to activate a single module with an authorized address would activate the many modules distributed through the efforts of the co-conspirators.

[2] There is no transcript of the trial, and neither party's appellate brief included a summary of the evidence. Our recitation of the government's case is based upon information provided by the Assistant United States Attorney who prosecuted the case. The sufficiency of the evidence is not contested.

> or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce.

The court concluded that television signals are "electronic communications" within the meaning of the statutory definition, 18 U.S.C. 2510(12); that satellite television descramblers are "electronic devices which effectuate the interception of electronic communications"; and that the interception of scrambled signals is "surreptitious" when undertaken without the knowledge or authorization of the signals' providers. Pet. App. 7a-8a.

Because the jury's special verdict indicated that petitioner had been found guilty of conspiring to violate both Section 2512(1)(b) and Section 1029, the court upheld petitioner's conviction to the extent that it rested on a conspiracy to violate the former Section. Pet. App. 9a. The court remanded for resentencing in light of the possibility that the sentence could have been affected by the jury's determination that petitioner had also conspired to violate Section 1029. On remand, the district court sentenced petitioner to 3½ years' probation and ordered him to pay a $5000 fine and $5000 in restitution.

ARGUMENT

Petitioner contends (Pet. 5-10) that 18 U.S.C. 2512 (1)(b) does not apply to the manufacture, sale, assembly, or possession of devices whose function is to descramble encrypted television signals. Because the decision below is correct and does not conflict with any decision of this Court or any other court of appeals, review by this Court is unwarranted.

The court of appeals correctly rejected petitioner's interpretation of Section 2512(1)(b). By its terms, that Section applies to "any person who intentionally * * * manufactures, assembles, possesses, or sells any electronic * * * device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of * * * electronic communications, and that such device * * * has been or will be sent through the mail or transported in interstate or foreign commerce." The plain language of the statute reaches descrambler modules of the sort distributed by the conspirators in this case. Each such module was an "electronic device" that was modified for the sole purpose of facilitating the "surreptitious interception" of satellite television signals intended for holders of authorized descrambler units. The scrambled transmissions were "electronic communications" as defined by 18 U.S.C. 2510(12); that term includes "any transfer of * * * images [or] sounds * * * of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce," with exceptions not applicable here.

There is no merit to petitioner's contention (Pet. 9-10) that the modules distributed by the conspirators were not "electronic devices which effectuate

the interception of electronic communications," since they themselves did not receive the satellite signal. The statute defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. 2510(4). Plainly, the modified descramblers distributed by the conspiracy were designed to "acqui[re] * * * the contents" of television programs that would otherwise have been unintelligible to owners of satellite dishes alone. By its terms, therefore, the statute encompasses devices of the type distributed by the conspirators in this case.

Contrary to petitioner's contention, Section 2512 (1)(b) does not contain an implicit exception for devices whose function is to permit the surreptitious interception of scrambled satellite television transmisions. Section 2511, which prohibits the interception of wire, oral, or electronic communications, contains an exemption for otherwise illegal conduct "that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—(i) to a broadcasting station for purposes of retransmission to the general public; or (ii) as an audio subcarrier intended for redistribution to facilities open to the public." 18 U.S.C. 2511(4)(c).[3] This exemption makes clear

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[3] The term "audio subcarriers" refers to "broadcast stations, cable TV systems and like facilities." S. Rep. No. 541, 99th Cong., 2d Sess. 22 (1986) [hereinafter *Senate Report*]. See also 18 U.S.C. 2511(4)(b) (providing a $500 fine for first offenders in cases in which the offense does not involve a tortious or illegal purpose or commercial advantage and the wire or electronic communication is a radio communication that is not scrambled or encrypted); 18 U.S.C. 2511(5) (providing for civil suits and civil fines for cases involving interception of private video communication that is not

Congress's understanding that Section 2511 applies to the unauthorized interception of satellite television signals. See *Senate Report* at 6-7. If the statute did not apply to that conduct, as petitioner suggests, there would have been no need for the exemption. Furthermore, the exemption permits the interception of satellite television transmissions only when the transmissions are not encrypted or scrambled. By necessary implication, the interception of scrambled transmissions remains prohibited. Since Section 2511 prohibits interceptions of scrambled television signals, there is no reason to suppose that Section 2512 contains an exemption—nowhere suggested in the text of that Section—for devices facilitating those interceptions.

Nothing in the legislative history on which petitioner relies justifies a departure from the plain language of the statute. Although the Senate Report included a glossary describing "some of the new telecommunications and computer technologies referred to" in the 1986 amendments to the statute (*Senate Report* at 8-9), the glossary was plainly not intended as an all-inclusive list of the technologies protected by the statute. Compare Pet. 8. As shown, the definitions that determine the statute's scope encompass satellite television transmissions, and provisions specifically addressing the interception of those transmissions confirm the statute's reach.

The Report's reference to the Communications Act of 1934, on which petitioner places heavy reliance (Pet. 9), was part of an explanation of the exemption that was ultimately enacted in Section 2511 (4)(c). As the material preceding the excerpt quoted

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scrambled or encrypted); 18 U.S.C. 2520(c) (fixing damages for conduct encompassed by 18 U.S.C. 2511(5)).

by petitioner makes clear, the "private viewing" referred to was limited to private viewing of transmissions within the exemption—*i.e.*, transmissions that were not encrypted or scrambled. See *Senate Report* at 21-22.[4] Read in context, the excerpt on which petitioner relies suggests no exemption for the interception of scrambled transmissions.

As the Report noted, private viewing of transmissions that are not encrypted is governed only by Section 705 of the Communications Act of 1934, 47 U.S.C. 605. Unlike 18 U.S.C. 2511, Section 705 prohibits some interceptions of satellite television transmissions that are not encrypted. Section 705(a) is a general prohibition on the interception of wire or radio communications; from that prohibition, Section 705(b) exempts "the interception or receipt * * * of any satellite cable programming for private viewing" if (1) the programming involved is not encrypted *and* (2) either no marketing system has been established under which the individual can be authorized to receive the programming or the individual has obtained authorization for private viewing under such a system.[5] Thus, Section 705 prohibits

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[4] A prior paragraph of the Report states, for instance, that "[s]ubparagraph (i) [18 U.S.C. 2511(4)(c)(i)] decriminalizes the interception of 'network feeds' under title 18" and that "[s]uch conduct will be governed exclusively by section 705 of the Communications Act." *Senate Report* at 22. The statute makes clear that the interceptions referred to—those that were decriminalized and thus made subject exclusively to the Communications Act—are limited to network feeds that have not been encrypted or scrambled.

[5] Secton 705(b), 47 U.S.C. 605(b), exempts from Section 705(a)

> the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such

the interception, for private viewing, of transmissions that are not encrypted or scrambled if the viewer has not obtained authorization in accordance with a marketing system available to him.

Finally, even if the legislative history of 18 U.S.C. 2511 could support an implicit exception to that section for "private viewing" of intercepted satellite television transmissions,[6] that exception would not be available to persons, like petitioner, who are in the business of distributing devices designed to give unauthorized persons access to scrambled satellite transmissions.

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interception or receipt, of any statellite cable programming for private viewing if—

(1) the programming involved is not encrypted; and

(2) (A) a marketing system is not established under which—

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has [*sic*] obtained authorization for private viewing under that system.

[6] "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1031 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). See *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

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